

**In the United States Court of Federal Claims**  
**OFFICE OF SPECIAL MASTERS**

**No. 01-267V**

**Filed: 30 April 2008**

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JIM and PATRICIA ADAMS, as \*  
representatives of the Estate of LIAM \*  
ADAMS, \*

Petitioners, \*

**PUBLISHED**

v. \*

SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*

Respondent. \*

\* \* \* \* \*

*Clifford John Shoemaker, Esq.*, Shoemaker and Associates, Vienna, Virginia, for Petitioner;  
*Alexis B. Babcock, Esq.*, U.S. Department of Justice, Washington, D.C., for Respondent.<sup>1</sup>

**DECISION ON ATTORNEY'S FEES AND COSTS<sup>2</sup>**

**ABELL**, Special Master,

Petitioners filed an application for attorney's fees and costs incurred in this case on 25 July 2007, to which Respondent filed objections in a Response Brief on 2 October 2007. Petitioners filed a reply brief on 15 October 2007, Respondent filed a surreply on 26 October 2007, and Petitioners filed one last brief on 8 November 2007. As the dust appears to have settled, the Court herein rules on Petitioners' motion.

The substantive merits of this Petition were resolved by a Decision dated 30 November 2006, which granted Program compensation to Petitioner. There, the Court considered heavily the expert

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<sup>1</sup> Throughout the period of this case in which attorney fees were actively disputed by brief, Respondent was represented by Robin Lynn Brodrick, Esq. Alexis B. Babcock noted her appearance subsequent to the last-filed brief.

<sup>2</sup> The Petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b)(2), she may seek the redaction of material in this decision that "would constitute a clearly unwarranted invasion of privacy" within fourteen days of the date of this decision.

testimony of Dr. Kinsbourne for Petitioner and Dr. Kohrman for Respondent, but found Dr. Kinsbourne of ultimately greater persuasive import:

And, in the final analysis, the Court finds Dr. Kinsbourne explanation of the autopsy findings regarding the histological picture involving certain ischemic changes in relation to a seizure event more persuasive than Dr. Kohrman's explanation that these were merely part of the agonal event.

Decision at 12.

Pursuant to § 15(e)(1) of the Vaccine Act,<sup>3</sup> Petitioner requested compensation for all attorney's fees and costs incurred in the proceedings appurtenant to the Petition. That section states, in relevant part, that "In awarding compensation ... [the] court shall also award as part of such compensation an amount to cover reasonable attorneys' fees, and other costs incurred in any proceeding on [the] petition." Given this statutory grant of mandatory jurisdiction pertaining directly to the case at bar, the Court examines the evidence presented by Petitioner regarding the attorneys' fees and other costs incurred in the prosecution of the Petition.

Based upon a summary review, the Court accepts as reasonable all of Petitioner's claims for compensation that were articulated with discernable particularity, and which were not the subject of an objection (also articulated with discernable particularity) from Respondent. Arguments that were not raised are deemed waived. Vaccine Rule 8(f). It is then to those items to which Respondent did object that the Court must focus its attention.

First and foremost, the Court must address Respondent's objection to Dr. Kinsbourne's hourly rate of \$500 per hour. The Court dismisses out of hand Respondent's patently spurious argument that Dr. Kinsbourne's somewhat circumscribed clinical practice diminishes his overall credibility, made in the face of his active teaching, research and writing, and clinical regimen. The Court also rejects Respondent's meretricious argument, amounting to no more than a normative, non-legal, anti-capitalistic<sup>4</sup> charge, that Dr. Kinsbourne's "unilateral decision" to raise his rates was "self-serving" (a decision actually made, bilaterally, between Dr. Kinsbourne and several parties, as the exhibits filed bear witness). Respondent's Surreply at 3. Additionally, the Court finds that Petitioner is not obligated by the statute to proffer "affidavits from other neurologists who practice in the same community, and state or local surveys," as Respondent argument demanded. *Id.* at 2.

As Petitioner points out, and as this Court has repeatedly reiterated in one form or another, "Dr. Kinsbourne's experience, qualifications, publications, academic affiliations, and active participation in Vaccine Program cases since its inception ... entitle him to charge and receive a

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<sup>3</sup> The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 *et seq.* (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

<sup>4</sup> See Adam Smith, *THE WEALTH OF NATIONS* ("It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.").

higher hourly rate than most petitioners' experts," and that "it is the combination of Dr. Kinsbourne's knowledge and efficiency that supports this high hourly rate." *Simon v. Secretary of HHS*, Case No. 05-941, 2008 WL 623833 \*6-7 (Fed. Cl. Spec. Mstr. Feb. 21, 2008). The Court will not now reduplicate the effort nor revisit the distance covered by the Chief Special Master's Decision in *Simon*. The rationale stated there is eminently logical, and the Court can now only cloud the waters by adding thereto.

Therefore, the Court here adopts the Chief Special Master's analysis of Dr. Kinsbourne's hourly rate. It seems that Dr. Kinsbourne was under the impression that an hourly rate of \$300 was all that he could hope to demand from petitioners in the Vaccine Program up to and including December 2006, and that he only raised his demanded rate thereafter to \$500 per hour, to reflect what he charged for similar work in other fora. *Simon, supra*, at \*8, note 9. The Court incorporates the ruling there, that \$500 per hour rate for Dr. Kinsbourne's services as an expert, from December 2006 thenceforward, is presumptively reasonable, and that the reasonable rate for Dr. Kinsbourne's services prior to that point is \$300 per hour.

In this case, Dr. Kinsbourne performed all compensable work before the issuance date of the Court's Decision on 30 November 2006. In this case, due to the facts recited herein, the Court finds an hourly rate of \$300 per hour to be reasonable for the purposes of compensation under § 15(e)(1).

As a simple matter of economics and contract law, the meeting of the minds at the time that the contract for expert services were agreed upon and rendered was that Dr. Kinsbourne would charge \$300 per hour for his work in this case. The best judge of market value for those contractual services is what the parties agreed upon in the stream of commerce, based upon their understanding of the information available to them at that time. If Dr. Kinsbourne agreed with Petitioner (via counsel) to perform the services rendered with the idea that \$300 is all he would be able to recoup from the Vaccine Program, Petitioner can hardly be heard to argue that the Court should compensate because Dr. Kinsbourne contracted to higher sums with other parties.

Although the generally-applicable rule is that "someone may charge more (or less) to perform work of a particular nature, based on what consumers are willing to pay that person to perform that task," such that "services should be compensable by reference to the services rendered, and not by reference to [an expert's] medical qualifications as such, standing alone" (*Kantor v. Secretary of HHS*, No. 01-679V, 2007 WL 1032378 \*5 (Fed. Cl. Spec. Mstr. Mar. 21, 2007)), the Court here focuses on what this service provider and this customer agreed upon at the time of formation of this contract for services. That Dr. Kinsbourne was charging Vaccine Program petitioners \$300, and continued to do so with the knowledge that \$300 was the amount he could expect to recoup, speaks for the economic rationality of that arrangement. Said another way, if Dr. Kinsbourne did not find participation in the Vaccine Program at the rate of \$300 to be advantageous, he certainly held the prerogative to cease his work in the Program; that he did not do so militates for the contrapositive conclusion. Even though he may have charged a higher rate in other judicial or non-judicial contexts, those arrangements, though certainly persuasive, do not overcome the fact that his typical pattern in Vaccine Program matters during the relevant period was to charge \$300 per hour. In the

absence of Dr. Kinsbourne's retainer agreement from the instant case to rebut the presumption, the Court accepts that he was charging \$300 per hour for his work in this case.

The only other objection raised by Respondent was for \$1,635.60 claimed by Petitioners for "Expert Expenses", which is a separate category from the fees charged for Dr. Kinsbourne's expert services, and distinct from his hotel accommodations at the time of the hearing in this case. *See* Application for Attorneys' Fees and Costs at 2, "Synopsis of Fees and Costs." Respondent objected that Petitioners "have failed to explain in any fashion the \$1,635.60 expenses," as is their burden under the law. Response Brief at 6. The sole documentary proof Petitioners filed on this point was a print-out listing of several expenses from the accounting software program used by Petitioners' Counsel, in which there is an entry reading "3/14/2006, [Mr. Shoemaker] Expense [No corresponding number listed], Marcel Kinsbourne, M.D., Ret." costed at "-1,635.60."

On the face of such bare pleadings, Petitioners seem to be double-charging the Program for charges passed between the Petitioners and their retained professionals. Payment of Dr. Kinsbourne's retainer through funds flowing from Petitioners' Counsel to the Doctor cannot be reimbursed where, as here, Petitioners themselves claim \$1,000 for their out-of-pocket expense for Dr. Kinsbourne's retainer. *Compare* Application for Attorneys' Fees and Costs at 2, "Synopsis of Fees and Costs" *and* Exhibit 2 to the Application for Attorneys' Fees and Costs, "Petitioner's Statement Regarding Retainers and Expenses." It may be that the claimed sum of \$1,635.60 is for another, appropriately compensable, expense. However, Petitioners have made no showing to carry their burden of proof on this point, despite a briefing volley in which they made three separate filings with plenty of exhibits throughout. The Court finds it safe to presume that if Petitioners possessed credible proof on this point, they would have filed it. As such, the Court finds the claimed sum of \$1,635.60 unreasonable and therefore uncompensable.

In summation, the Court employs Petitioners' Synopsis of Fees and Costs, with the adjustments stated *supra*. From Petitioners' total amount claimed of \$53,037.73 is subtracted \$1,635.60, leaving \$51,402.13. Then, the amount claimed for fees attributable to expert services is changed from \$17,625.00 to \$10,575.00. The final total amount recoverable by Petitioners then becomes \$44,352.13.

Based on a review of Petitioners' application for attorneys' fees and costs, and the documentation attached thereto, the Court finds that Petitioners are entitled under § 15(e)(1) to an award in the amount of \$44,352.13. Therefore, in the absence of a motion for review filed in compliance with Vaccine Rules 23 and 24, the clerk of the court is directed to enter judgment in favor of Petitioner in the amount of \$44,352.13 for reasonable attorneys' fees and costs.

**Hence, a check for \$1,350.00 shall be paid to Petitioners,<sup>5</sup> and a check for \$43,002.13 shall be paid to Petitioners and Petitioners' Counsel jointly.**

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<sup>5</sup> Petitioners themselves paid \$1,350.00 toward the prosecution of this Petition. Affidavit of Petitioners, Exhibit 2 to Petitioners' Application for Attorneys' Fees and Costs. The remainder was paid or credited on Petitioners' behalf by Petitioners' Counsel.

These amounts are intended to cover all legal expenses and encompass all charges by the attorney against a client including “advanced costs” as well as fees for legal services rendered. An attorney may not charge or collect fees or costs in addition to the amount awarded herein. See 42 U.S.C. § 300aa-15(e)(3); *Beck v. Secretary of HHS*, 924 F.2d 1029 (Fed. Cir. 1991).

**IT IS SO ORDERED.**

s/ Richard B. Abell  
**Richard B. Abell**  
Special Master